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No. 95-806

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL
OF BALTIMORE CITY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. Among the constitutional rights that WLF defends in judicial and administrative proceedings is the right of commercial free speech. To that end, WLF has appeared before this Court and other federal and state courts as an *amicus* in commercial free speech cases, including *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990). In addition, WLF believes strongly in the importance of preserving the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act. That policy reinforces First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict advertising.

Here, the Fourth Circuit's approach to the third prong of the *Central Hudson* test improperly relieves municipalities of their constitutional burden in justifying content-based bans on commercial speech. Moreover, the municipal ban of cigarette advertising at issue here occurs in a regulatory area that appears to be preempted by federal statute. The Fourth Circuit's analyses under the First Amendment and the Federal Cigarette Labeling and Advertising Act, if followed widely by lower courts, could lead to widespread denial of commercial speech rights.

All parties to this action have consented to WLF's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

The decision below upheld, against challenges of First Amendment violation and federal preemption, a content-based prohibition on certain signs in Baltimore, Maryland. The City of Baltimore's criminal ordinance substantially restricts the outdoor advertising of cigarettes pursuant to a scheme that can best be characterized by the recent words of this Court in *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995): "a unique and puzzling regulatory framework" permeated by "irrationality." Moreover, Baltimore's "unique and puzzling regulatory framework" pertains to cigarette advertising, which Congress has specifically chosen to regulate under the Federal Cigarette Labeling and Advertising Act.

In challenging the Ordinance, Petitioner presented evidence disputing the City of Baltimore's assertion that its Ordinance "is a reasonable and necessary measure for reducing illegal consumption of cigarettes by minors." *See* Appendix to Petitioner's Petition for Writ of Certiorari at 74a (hereafter "Pet. App."). However, the lower courts disregarded Petitioner's evidence on this issue under the *Central Hudson* test, and the Fourth Circuit affirmed the

district court's decision "to accept the judicially-recognized proposition that advertising increases consumption." *Id.* at 23a. Additionally, Petitioner was denied the opportunity to develop further the evidentiary record regarding any causal relationship between tobacco advertising and consumption. *Id.* at 5a. Accordingly, the First Amendment issue raised here is the appropriate standard for judging the evidentiary basis upon which the legislature professes to rely.

Since *Central Hudson*, the Circuits have split between requiring, as this Court most recently did in *Rubin*, that "a governmental body seeking to sustain a restriction on commercial speech must *demonstrate* that the harms it recites are real and that its restriction will *in fact* alleviate them to a material degree," 115 S. Ct. at 1592 (quoting *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993)) (emphasis supplied), and requiring merely, in the words of the Fourth Circuit, that it be "*reasonable*[]" for the legislature to "*belie[ve]* that the means it selected will advance its ends." *See* Pet. App. at 11a (emphasis supplied) (quoting the related opinion of *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995)). The lack of a clearly defined standard encourages courts to choose the approach that most likely comports with their own policy views.

Here the Fourth Circuit erroneously assumed that there are only two alternatives under *Central Hudson*'s third prong: unbridled judicial involvement in reviewing legislative determinations as to the Ordinance's direct and material advancement of its goal, or total judicial deference in commercial free speech cases. That is a false dichotomy; holding governmental bodies that seek to impose commercial speech restrictions to the demanding evidentiary burden imposed by *Edenfield* does not require wholesale second-guessing of legislative determinations. So long as this Court continues to subscribe to the *Central*

Hudson intermediate scrutiny approach,[1/] the judiciary can continue to defer to well-supported legislative determinations without abdicating its First Amendment review function. This Court should now clarify the contours of its intermediate scrutiny approach, to prevent *both* wholesale judicial second-guessing *and* blanket judicial endorsement of legislative conclusions. Such an approach preserves meaningful review to ensure protection of the legitimate exercise of First Amendment commercial speech rights. The Fourth Circuit's approach, in contrast, amounts to no review at all.

The Fourth Circuit's complete deference to the legislature is magnified by the fact that the legislature's exercise of its local police powers has occurred in an area that appears to be preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.* ("the Act"). The Act in its present form, which includes a broadly sweeping preemption provision, was enacted for the purpose of, *inter alia*, "[p]rohibit[ing] health-related regulation or prohibition of cigarette advertising by any State or local authority." S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969).

Petitioner's case evidences the judicial confusion regarding the scope of the Act's preemption clause, as amended in 1969. While this Court has addressed the relationship of private damage actions to the Act's amended preemption clause (*see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)), the issue of what aspect of cigarette advertising -- if any -- remains open for regulation by a local government is an unanswered question, requiring this Court's clarification.

[1/] The alternative is the approach advocated by Justice Stevens in his concurring opinion in *Rubin*. *See* 115 S. Ct. at 1594.

The conflicting approaches adopted by courts in attempting to resolve this issue illustrate the same type of judicial activism now prevalent in the First Amendment context. Based on personal policy preferences, lower courts have either: (1) found local restrictions of cigarette advertising preempted after interpreting the restriction as health-related; (2) upheld such restrictions after interpreting them as effectuating a statutory purpose not preempted by the Act, such as prohibitions against cigarette sales to minors; or (3) conceded that the restrictions were health-related (as the Fourth Circuit did here) but nonetheless upheld them on the ground that only some types of health-related restrictions are preempted. However, the policy of national uniformity expressly embodied in the Act's statement of purpose (15 U.S.C. § 1331) calls into question this arbitrary analysis of the preemption issue.

ARGUMENT

I. THE FOURTH CIRCUIT'S OPINION ILLUSTRATES THE DISARRAY AMONG THE CIRCUITS IN APPLYING THE THIRD PRONG OF THE *CENTRAL HUDSON* TEST

A. The Fourth Circuit's Failure To Hold The City To Its Constitutional Burden Of Proof Reveals The Difficulty That The Circuits Face In Performing The Intermediate Level Of Scrutiny Mandated By The *Central Hudson* Test

The burden is on the government to justify regulation of commercial speech that concerns a lawful activity and is not misleading. A municipality must: (1) assert a substantial interest in support of its regulation; (2) demonstrate that the regulation advances that interest "in a direct material way"; and (3) demonstrate that the asserted government interest could not "be served as well by a more

limited restriction on commercial speech." *Edenfield v Fane*, 113 S. Ct. 1792, 1798 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980). As the Fourth Circuit correctly recognized, the dispute in this case revolves around whether Baltimore has sufficient justification for its Ordinance under the latter two of these factors -- commonly known as the third and fourth prongs of *Central Hudson*'s four-prong standard of "intermediate scrutiny" review for commercial speech. *See* Pet. App. at 10a-11a; *Rubin*, 115 S. Ct. at 1591.

The Fourth Circuit, in determining that Baltimore's Ordinance met the *Central Hudson* test for the restriction of commercial speech, stated:

> There is a *logical nexus* between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. . . . The proper standard for approval must involve an assessment of the *reasonableness* of the legislature's belief that the means it selected will advance its ends.

Pet. App. at 11a (emphasis supplied) (quoting *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995)). On this basis, the Fourth Circuit declined to consider even the plainest contrary evidence that Petitioners submitted -- an even more extreme approach than other circuits that have adopted a "reasonableness" test. *See, e.g., Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259; *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th

Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

In interpreting *Central Hudson*'s standard as one requiring only a "logical nexus" and a "reasonable belief" that the means will directly and materially advance the end, the Fourth Circuit reduced the *Central Hudson* test from one of "intermediate scrutiny" to one of mere "rational basis" review, as evidenced by its disregard of any contrary, compelling evidence. Such an approach flies in the face of this Court's pronouncements regarding the proper review of commercial speech regulations: the legislature is required in an intermediate level of constitutional review to "demonstrate that the harms it recites are real and that a restriction will in fact alleviate them to a material degree." *Rubin*, 115 S. Ct. at 1592 (quoting *Edenfield*, 113 S. Ct. at 1800). *See also Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994).

The straying of the Fourth Circuit from the Court's standard is not unique. Since *Central Hudson*, and even since *Edenfield* and its progeny clarifying *Central Hudson*'s standard, lower courts have exhibited confusion regarding the third and fourth prongs and the requisite level of intermediate scrutiny. Some courts reviewing commercial speech regulation have required the government to put forth empirical proof, under a "preponderance of the evidence" burden, to demonstrate the requisite direct or material advancement of the asserted goal. *See, e.g., MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994); *Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993); *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993), *aff'd sub nom. Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). Others have

delegated their mandate to protect the First Amendment to the legislature and have refused to subject the government to a "preponderance of the evidence" burden. *See, e.g., Dunagin*, 718 F.2d at 738; *Crisp*, 699 F.2d at 490.

The latter approach has reached its nadir here and in the Fourth Circuit's related opinion, *Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), which the Fourth Circuit relied upon in dismissing Petitioner's First Amendment challenge to Baltimore's Ordinance regulating cigarette advertising. In *Anheuser-Busch*, the Fourth Circuit affirmed dismissal at the pleading stage of First Amendment challenges to Baltimore's similar ban on outdoor advertising of alcoholic beverages. While the Fourth Circuit at least termed its analysis of Petitioner's claims here, against Baltimore's regulation of cigarette advertising, as one under the summary judgment standard of Federal Rule of Civil Procedure 56(c), the Fourth Circuit nevertheless disregarded Petitioner's evidence disputing Baltimore's assertion that its advertising ban "materially advances" its goal of reducing cigarette use by minors.

Moreover, the Fourth Circuit affirmed the district court's refusal to open the case up for discovery before ruling on the First Amendment issues at stake (Pet. App. at 5a), and agreed "with the district court that a facial challenge to an ordinance restricting commercial speech may be resolved as a question of law *when the government meets the burden placed on it by Central Hudson*." *Id.* at 6a (emphasis supplied). Here, however, Baltimore did not meet its burden under *Central Hudson* (i.e., to demonstrate that its advertising restriction will *in fact* alleviate cigarette use by minors to a material degree), and the Fourth Circuit failed to require it to do so. Rather the Fourth Circuit ruled that Baltimore could carry its constitutional burden

"by pointing to legislative facts, studies, history, or common sense, [and thus] an understanding of the ordinance's factual impact on particular parties [such as Baltimore's youth] is not necessary to the inquiry." Pet. App. at 7a.

The Fourth Circuit's refusal to consider Petitioner's evidence, as well as affirmance of the district court's decision preventing development of a complete evidentiary record, were inevitable given the continuing practice of some lower courts to interpret *Central Hudson*'s standard as a lower-level, "rational basis" review -- a standard, ironically, that amounts to judicial activism by forsaking the duty of the judiciary in First Amendment cases to the court's sympathy with legislative policy. Despite its inevitability, such dismissals -- either at the pleading or summary judgment stage -- stand in stark contrast to this Court's repeated statements that deference to legislative findings simply cannot limit judicial inquiry where significant constitutional principles are at stake. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 249 (1974). We therefore respectfully urge this Court to grant certiorari in this case for purposes of clarifying how the lower courts should exercise the intermediate scrutiny required under *Central Hudson*, and how governments seeking to regulate commercial speech can meet the burden of proof imposed by *Central Hudson*.

B. The Fourth Circuit's Refusal To Consider Petitioner's Evidence, In Disregard Of *Central Hudson*, Sets A Dangerous Precedent

Baltimore has asserted that its Ordinance "restricting the placement of advertisements for cigarettes in publicly

visible locations within Baltimore City is a reasonable and necessary measure for reducing illegal consumption of cigarettes by minors." Pet. App. at 74a. The Ordinance contains a preamble which sets forth, as support for the alleged "necessity" of the Ordinance, select judicial opinions and excerpts from a limited number of studies published in various health and medical journals. Pet. App. at 71a-74a.

On this basis, the Fourth Circuit affirmed summary judgment in favor of Baltimore, but this case is not one properly resolved at the summary judgment stage where the evidentiary record is far from complete. Petitioner was entitled to the opportunity to show that Baltimore's grounds for its decision to circumscribe the First Amendment rights of cigarette advertisers and adult consumers were derived from political and/or controverted sources. Petitioner was entitled to the opportunity to obtain and present evidence that the case law and studies cited in the Ordinance's Preamble and legislative history, contrary to the Fourth Circuit's conclusion, do not "demonstrate in fact" that the restriction of outdoor signs advertising cigarettes "directly advances" Baltimore's campaign against underage smoking.

Moreover, it is not proper for a court to uphold a restriction on speech based on indiscriminate "judicial notice" of the restriction's direct and material advancement of its goal. For every opinion that takes judicial notice of a positive correlation between advertising and behavior, another exists which requires more than a "legislature's commonsense judgment," which the Fourth Circuit found sufficient here, that the regulation will directly and materially advance the governmental interest. Pet. App. at 7a. *See, e.g., Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85 (1977) (holding that an ordinance prohibiting "For Sale" or "Sold" signs on residential property was not justi-

fied by municipality's perception that such a prohibition would reduce the flight of white homeowners from a racially integrated neighborhood); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding that a prohibition of contraceptive advertising was not justified on grounds that ads would legitimize sexual activity of young people).

Here, Baltimore chose its evidence selectively. For instance, nowhere on its list appears the contrary 1990 conclusion of the Federal Trade Commission ("FTC"), an independent agency which has scrutinized the impact of controversial advertising for decades. In testimony before the U.S. House of Representatives Commerce Committee, the FTC noted:

> The Commission believes that the evidence is inconclusive on the issue of the linkage between alcohol advertising and consumption. There are studies that appear to support either position, and this same conclusion is expressed in the recent report on alcohol and health by the Department of Health & Human Services.

See Health Warnings on Alcoholic Beverage Advertisements: Hearing on H.R. 4493 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. 35-41, at 37 (1990) (prepared statement of the FTC) (citing U.S. Dept. of Health and Human Services, *Alcohol and Health* 211-12 (1990)). The linkage between cigarette advertising and consumption falls into a similar inconclusive category. The FTC suggested that the inconclusiveness of the evidence may be due to the limits of the available research methodology, *id.*; if true, this observation further

underscores the fact that Petitioner here should have had an opportunity to impeach the City's "evidence."[2/]

In deciding to take "judicial notice" of assumptions made by Baltimore in its own favor, and to rely unquestioningly on studies chosen by Baltimore for inclusion in the Ordinance's legislative history, the Fourth Circuit has set a troubling precedent. By according absolute deference to a legislative determination that billboards increase consumption of the advertised product by children, the Fourth Circuit is abdicating all meaningful judicial review of advertising restrictions where the legislature has an arguable basis for discouraging consumption by children.

For example, recent medical studies suggest that if eating habits do not change early in life, obese children are likely to become obese adults susceptible to early death and a variety of diseases. *See, e.g.*, S. Squires, *For U.S. Youth, Weight Becomes Growing Problem*, Wash. Post, Oct. 3, 1995, at A1; S.S. Gidding et al., *Improving Children's Heart Health: A Report From The American Heart Association's Children's Heart Health Conference*, 65 J. School Health 129 (Apr. 1995); M. Corey, *Sizing Up A Generation*, Balt. Sun, Mar. 19, 1995, at 1K (noting that top ten foods purchased by teen-agers are gum, ice cream, fast-food hamburgers, chocolate candy, pizza, nonchocolate candy, breath mints, cookies, hard candies, and potato chips). Under the Fourth Circuit's deferential reasoning, Baltimore could properly restrict outdoor signs for virtually any unpopular product or service. Surely, the third prong

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[2/] For the Court's convenience, a copy of the FTC's statement before the House Energy and Commerce Committee, cited herein, has been lodged separately with the Clerk of the Court.

of *Central Hudson* is not as flaccid as the Fourth Circuit's opinion would indicate. If the lower courts disregard *Edenfield*'s clarification of the *Central Hudson* test, the First Amendment will be subordinated to every community's evolving attitudes. The First Amendment, however, is and must be grounded on a firmer foundation.

Because the Fourth Circuit deferred unquestionly to Baltimore's "commonsense" judgment, it prevented the discovery necessary to develop a record comparing the number of advertisements affected by Baltimore's Ordinance with the number remaining in the city subject to the view of minors. Thus, the type of evidence critical to this Court's decisions in *Rubin* and *Discovery Network* does not even exist in this case. This case therefore goes well beyond the common issue of whether an appellate court "correctly" resolved a First Amendment challenge after considering the parties' respective evidence at the summary judgment stage, because the Fourth Circuit abdicated its constitutional responsibility of judicial inquiry.

II. THE FOURTH CIRCUIT'S OPINION EXEMPLIFIES THE SPLIT IN THE JUDICIARY REGARDING PERMISSIBLE STATE ACTIVITY WITH RESPECT TO CIGARETTES

In 1965, responding to state and local proposals to regulate cigarette advertising, Congress enacted the Federal Cigarette Labeling and Advertising Act ("the 1965 Act"), which required the placement of a conspicuous warning statement regarding the health risks of smoking on every package of cigarettes sold in the United States. 15 U.S.C. §§ 1331-1340 (1982 ed.). The purposes of the 1965 Act were to: (1) adequately inform the public that cigarette smoking may be hazardous to health; and (2) protect the

national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations. *Id.* at § 1331. The 1965 Act included an express preemption provision providing that:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Id. at § 1334(b).

Four years later, in the wake of preparations by State governments to pass further regulations regarding cigarette advertising, Congress passed the Public Health Cigarette Smoking Act of 1969 ("the 1969 Act"), which amended the 1965 Act by strengthening the mandatory warning label and banning cigarette advertising on radio and television. 15 U.S.C. §§ 1331-1340, as amended (1995 Supp.). Significantly, the 1969 amendments clearly provided a broad scope for the preemption section which now reads:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Id. at § 1334(b). Furthermore, the amended Act expressly preserved the jurisdiction of the Federal Trade Commission over false and deceptive advertising. *Id.* at § 1336(b).

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 509 (1992), this Court granted certiorari to resolve a split in the Circuits "[b]ecause of the manifest importance of the issue"

of whether various common-law claims were preempted by Section 1334(b) as originally drafted in the 1965 Act and as amended in 1969. In comparing the preemptive scope of the 1965 Act to the 1969 amendments, this Court found the language of the amended preemption provision to be "much broader" than that of its 1965 predecessor. *Id.* at 520. As this Court noted, the later amendments bar "not simply 'statement[s]' but rather 'requirement[s] or prohibition[s] ... imposed under State law.'" *Id.* The Ordinance at issue here is indisputably a "prohibition imposed under State law with respect to the advertising" of cigarettes by outdoor signs in certain parts of the city. Also, the City conceded during oral arguments in the Fourth Circuit that its advertising restriction was designed to advance public health goals. Thus, this case turns on whether, as argued by the Fourth Circuit, the 1969 Act preempts only those health-related cigarette advertising restrictions that regulate the *content* of signs, not those that regulate sign *location*.

The few courts that have considered this issue offer conflicting views regarding whether the 1969 Act left any local police powers intact to regulate cigarette advertising -- and if so, what the extent of those remaining police powers might be. Some courts have taken a broad view of preempting health-related restrictions, looking beyond the non-health justifications cited by the legislature. For example, in *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994), the Second Circuit held that the 1969 Act preempted a city ordinance requiring at least one public health message to be displayed for every four tobacco advertisements displayed on property and facilities licensed by the city. The Second Circuit found that New York City's ordinance was indeed a "requirement ... based on smoking and health ... with respect to the advertising or promotion of any cigarettes" because the ordinance's declaration of legi-

slative findings noted "the grave dangers posed by tobacco use" and "the problem of smoking by minors," and the ordinance's effect "would be to educate the public as to the adverse health risks of smoking." *Vango*, 34 F.3d at 73.

In so ruling, the Second Circuit rejected New York City's argument that its ordinance was enacted in light of the economic costs related to smoking, as evidenced by the legislative finding, contained in the ordinance, that "tobacco use threatens the general welfare of all New Yorkers by causing enormous financial costs to the taxpayers, in the form of health care benefits, and a loss of productivity among the city's workforce." *Id.* Moreover, the Second Circuit found unpersuasive New York City's point "that the Local Law is not aimed at advertising or promotion, but is geared rather towards informing the City's youth of the dangers of cigarettes." *Id.* at 74. Whether the ordinance was "geared" by the legislature towards advertising was immaterial to the Second Circuit since the ordinance's impact was the same as an advertising regulation, and quite different from the effect of restrictions on cigarette sales to minors or smoking in public places -- regulatory powers which the legislative history clearly indicates are not preempted by the 1969 Act. S. Rep. No. 566, 91st Cong., 1st Sess. 1, 12 (1969); *Cipollone*, 505 U.S. at 529 n.26.

Similarly, a district court has held that a plaintiff was preempted from challenging the "Joe Camel" advertising campaign for the "Camel" brand of cigarettes, where the plaintiff's claims asserted that the campaign was an unlawful and unfair business practice because it targeted minors. *See Sparks v. R.J. Reynolds Tobacco Co.*, No. C94-783C, slip op. (W.D. Wash. Dec. 9, 1994). As a remedy, the plaintiff sought to enjoin the defendant cigarette company from targeting minors with its ad

campaign, and to require the defendant to distribute corrective advertising to negate the effect of the allegedly unfair ads. *Id.* at 2. Although the plaintiff characterized her suit as one seeking a prohibition based on the defendant's duty not to violate the law by inducing illegal cigarette sales to minors, rather than a prohibition based on smoking and health, the district court was unpersuaded by this semantical "form over substance" argument:

> The remedy plaintiff seeks here would bar certain advertisements so that minors would not be induced to smoke, and become addicted, while at a stage in life when they are unable to make mature decisions. Plaintiff's professed purpose is to protect children. The effect of the remedy plaintiff seeks would be to prevent children from becoming addicted to nicotine, a health concern. Thus the effect of plaintiff's cause of action is also health-based.

Id. at 7 (citations omitted).

Under the analysis of *Vango* and *Sparks*, Baltimore's Ordinance, restricting certain outdoor cigarette advertisements for the purpose of decreasing minors' cigarette consumption, is health-based -- despite Baltimore's citation, as the first legislative finding in the Ordinance's preamble, to the Maryland statute that makes it illegal to provide cigarettes to minors. Pet. App. 70a. The statute authorizing the City's action expressly refers to health,[3/] and the

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[3/] Baltimore's Ordinance cites to Section 404 of Article 27 of the Maryland Code as its statutory authority (Pet. App. at 70a). As originally enacted in 1886, this section was entitled "An Act

(continued...)

legislative history is replete with references to health as well. For instance, as justification for this prohibition, the preamble of Baltimore's Ordinance cites, *inter alia*, to a State Department of Education survey which found that:

> Cigarettes constitute a "gateway drug" among Maryland students, i.e., a substance which is used by adolescents as a first drug and opens the door for use of other "harder" substances at a later date.

Pet. App. 73a-74a. In addition, the Ordinance's preamble cites to ten articles in medical and health journals, each of which identifies health risks as the underlying reason for research regarding the smoking habits of children and their awareness of cigarette advertising. *Id.* at 72a-73a. Thus, Baltimore's Ordinance seeks to restrict outdoor advertising of cigarettes in areas of the city where minors "live, attend school, attend church and engage in recreational activities" (*id.* at 75a) precisely because Baltimore is concerned about the health and well-being of the youth within its municipal boundaries. Under the *Vango Media/Sparks* analysis, Baltimore's restrictions on cigarette advertising are clearly preempted under the broader preemptive provision of the 1969 Act because the Ordinance is "based on smoking and [the] health [of Baltimore's children]."

Other courts have been less generous toward preemption, including the district court and Fourth Circuit in this case, which ruled that Baltimore's Ordinance was not preempted by the 1969 Act. The district court viewed the

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[3](...continued)
To Protect The Health And Morals Of Minors In The State Of Maryland."

Ordinance as "clearly aimed at the illegal sale of cigarettes to minors," and therefore not preempted because "[i]t is certainly within the City's power to pass a law meant to effectuate a valid State law." Pet. App. at 37a. The Fourth Circuit reached the same result based on its interpretation that Baltimore's "regulation simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated." *Id.* at 9a.

In ruling against Petitioner on the preemption issue, the Fourth Circuit has followed an analytical approach which stands in direct contrast to that of *Vango Media* and *Sparks*. The Fourth Circuit's approach also differed from that of the California Supreme Court, which held that the 1969 Act did not preempt unfair business practices claims asserted against an advertising campaign allegedly targeted at minors "for the purpose of inducing and increasing their illegal purchases of cigarettes." *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 75 (Cal.), *cert. denied*, 115 S. Ct. 577 (1994). The plaintiff's action was allowed to go forward because the court viewed the claim as predicated upon a duty not to engage in unfair competition by encouraging others to violate the law, rather than upon a duty based on smoking and health. In so ruling, the California court rejected the argument that health concerns actually underlay the plaintiff's action, emphasizing instead the penal statute prohibiting cigarette sales to minors which, according to the court, resulted from the state's nineteenth-century desire to protect the morals of its youth rather than from modern health concerns. *Mangini*, 875 P.2d at 81.

In addition to the overall split on the appropriate approach to preemption as it affects the issue of whether a restriction is health-based, the partial ban in this case presents some unique issues not previously addressed by

this Court. Justice Blackmun, in his concurring and dissenting opinion in *Cipollone*, observed in dictum that an outright ban on cigarette advertising would be preempted under the Act. 505 U.S. at 539. And, the statutory scheme of which the preemption provision is a part includes a national ban on radio and television ads, suggesting that Congress may have intended that any partial advertising bans would be enacted on a national basis.

The states and localities are now poised to enact a variety of regulations affecting cigarette advertising, or to apply existing regulations to that activity (*see* Petition at 6 n.5), just as they were when Congress enacted the Cigarette Labeling and Advertising Act, and when this Court decided *Cipollone*. Again, because of the "manifest importance of the issue," we urge this Court to resolve the conflict in interpreting a statute that, in its own words, bears heavily on health and the national economy alike.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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